No. 23-

IN THE

Supreme Court of the United States

CATHERINE CRAIG-MYERS INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT MYERS,

Petitioner,

v.

OTIS ELEVATOR COMPANY, A CONNECTICUT FOR PROFIT CORPORATION; LOUIS CARL DEVINCENTIS, INDIVIDUALLY AND AS AN EMPLOYEE OF OTIS ELEVATOR COMPANY; JAMES DUDA, INDIVIDUALLY AND AS AN EMPLOYEE OF OTIS ELEVATOR COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA FIRST DISTRICT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do Florida trial and appellate courts violate constitutional rights to a jury trial and due process by refusing to admit into evidence culpable negligence conduct violating federal preemptive OSHA elevator safety laws that supersede less stringent conflicting state elevator safety laws which deny a jury trial in a wrongful death damages case?

2. Does a Florida trial court deny constitutional rights to due process and jury trial by refusing to admit into evidence culpably negligent conduct violating applicable preemptive federal OSHA elevator safety laws that do conflict with less stringent Florida state elevator safety laws and which superseding federal OSHA evidence would mandate a jury trial?

3. Does a Florida Appeals Court of last resort violate constitutional rights to a jury trial and due process by PCA "rubber stamping" a trial court's summary dismissal of a wrongful death case by prohibiting culpable negligence conduct violating federal preemptive OSHA elevator safety laws which evidence would otherwise mandate a jury trial?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Catherine Craig-Myers individually and as Personal Representative of the Estate of Robert Myers and the respondent Otis Elevator Company and its employees James Duda and Louis Devincentis.

Respondent Otis Elevator Company is a for profit corporation organized and existing pursuant to the laws of the state of Connecticut.

RELATED CASES

The related cases include the following:

Catherine Craig-Myers individually and Catherine Craig-Myers and as Personal Representative of the Estate of Robert Myers v OTIS ELEVATOR COMPANY, A Connecticut for profit Corporation; LOUIS CARL DEVINCENTIS, individually and as an employee of OTIS ELEVATOR COMPANY; JAMES DUDA, individually and as an employee of OTIS ELEVATOR COMPANY, Case No. 2017 CA 2239 in the Second Judicial Circuit Court in and for Leon County Florida judgment rendered on November 8, 2021. (App. B pp. 4a-15a) The trial court orders denying Rehearing were entered on November 16, 2021 and December 8, 2021.

Catherine Craig-Myers individually and Catherine Craig-Myers and as Personal Representative of the Estate of Robert Myers v OTIS ELEVATOR COMPANY, A Connecticut for profit Corporation; LOUIS CARL DEVINCENTIS, individually and as an employee of OTIS ELEVATOR COMPANY; JAMES DUDA, individually and as an employee of OTIS ELEVATOR COMPANY, Case No.1D21-3838 In the Florida First District Court of Appeals, Per Curiam Affirmed opinion rendered on July 7, 2023. (App. A pp. 1a-2a) The order denying Rehearing and Motion for Opinion by the Florida First District Court of Appeals was entered on August 14, 2023 reprinted in the Appendix hereto. (App. D pp. 23a-24a)

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The Petitioners Catherine Craig-Myers individually and as Personal Representative of the Estate of Robert Myers respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Florida First District Court of Appeals entered in the above-entitled proceeding on July 14, 2023.

OPINIONS BELOW

The initial Per Curiam Affirmed opinion of the Florida First District Court of Appeals was rendered on July 7, 2023. (App. A, pp. 1a-2a) The order denying Rehearing and Motion for Opinion by the Florida First District Court of Appeals was entered on August 14, 2023 reprinted in the Appendix hereto. (App D. pp. 23a-24a)

The initial order and opinion of the trial court was entered on November 8, 2021. (App. B, pp. 4a-15a) The trial court orders denying Motion for Leave of Court to Add a Claim for Punitive Damages was entered on June 29, 2020 (App. C, pp.17a-22a)

JURISDICTION

This civil wrongful death negligence case invoked Florida state trial court jurisdiction pursuant to Article V Section 5 of the Florida Constitution. The state court summary judgment dismissal and denial of rehearing was appealed pursuant to Article V Section 4 of the Florida Constitution to the Florida First District Court of Appeals. The Per Curiam Dismissal order and denial of rehearing rendered by the Florida First District Court of Appeals were not reviewable by the Florida Supreme Court which lacks jurisdiction to hear appeals in cases

rendered without written opinions by the Florida District Courts of Appeal. R.J. Reynolds Tobacco Co., 882 So. 2d 986, 989-90 (Fla. 2004) (per curiam); Jenkins v State, 385 So. 2d 1356 (Fla. 1980); Grate v State, 750 So.2d 625, 626 (Fla 1999); Persaud v State, 838 So. 2d 529,533 (Fla. 2003).

This Court has jurisdiction to hear this case pursuant to Title 28 United States Code Section 1257 which permits judicial review of opinions that have been rendered by the highest court in Florida in which a decision could be had. Cox Broadcasting Corp. v Cohn, 420 U.S. 469, 479-483 (1975)

The initial Per Curiam Affirmed opinion of the Florida First District Court of Appeals was rendered on July 7, 2023. (App. A, pp. 1a-2a) The order denying Rehearing and Motion for Opinion by the Florida First District Court of Appeals was entered on August 14, 2023 reprinted in the Appendix hereto. (App D. pp. 23a-24a)

CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE VI, SECTION 2 PROVIDES:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

SEVENTH AMENDMENT PROVIDES:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

FOURTEENTH AMENDMENT PROVIDES:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

Title 29 United State Code Section 1910 "Occupational Safety and Health Act" (OSHA)

> (a) Except as provided in paragraph (b) of this section, the standards contained in the Part shall apply with respect to employments performed in a workplace in a State, the District of Columbia, the Commonwealth of the Northern Mariana Islands, Wake Island, Outer Continental Shelf lands defined in the

> Outer Continental Shelf Lands Act, and Johnston Island.
>
> ****
>
> (c)(1) If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation or process.
>
> (2) On the other hand, any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry, as in subpart B or subpart R of this part, to the extent that none of such particular standards applies. To illustrate the general standard regarding noise exposure in Sec 1910.95 applies to employments and places of employment in pulp, paper, and paperboard mills covered by Sec 1910.261.

STATEMENT OF THE CASE

Plaintiff/Appellant Robert Myers was a 16-year veteran OTIS Elevator Co. ("OTIS ") employee mechanic assigned to work in the Tallahassee area. Myers was frequently assigned to inspect, maintain, troubleshoot and repair the 31 elevators at Tallahassee Memorial Hospital and the adjacent TMH Professional Office Building containing lobby elevators #16, 17, 18 and 19. OTIS had

a maintenance contract with TMH which provided that OTIS would "instruct our personnel to use appropriate personal protection equipment and follow safe work practices."

On February 17, 2017, OTIS mechanic Robert Myers was struck, crushed and killed after accessing the hoistway of Elevator #17 to troubleshoot electrical circuitry "live" (i.e. without lockout/tagout "LOTO") Following mandated workplace investigation, OSHA issued five citations of applicable Federal OSHA regulation violations against OTIS on July 20, 2017. Plaintiff's initial wrongful death complaint filed on 26, 2017 alleged that OTIS, its President, and its supervisory employees Duda and DeVincentis engaged in intentional tort conduct which did vitiate workers compensation immunity. The complaint alleged that the OTIS Defendants did create and enforce company workplace practices incorporating state elevator laws that did directly conflict with mandatory applicable superseding Federal OSHA regulations. The complaint also alleged the conflicting workplace practices which allowed accessing the hoistway to troubleshoot electrical circuitry "live" in the hoistway (without locking out and tagging out the electrical energy) did present a known unmitigated imminent deadly danger of struck by and crush hazards to the elevator mechanic which were the proximate cause of Myers workplace death.

The complaint further alleged Myers' supervisors strictly enforced the known deadly dangerous state law workplace practices upon penalty of discipline and termination of employment with conscious disregard and deliberate difference to the known risk of imminent serious injury and death. The OTIS Defendants knowledge of the deadly dangerous workplace risk was alleged to

arise from at least one prior similar death which occurred "in near exact manner", explicit conflicting OSHA warnings specifically identifying the known danger, OTIS safety patents and policies specifically identifying the known danger, and OTIS' intentional false propaganda misrepresentation campaign promoting the "big lie" to appellant, other elevator mechanics and the public verbally and in writing that OTIS' state elevator troubleshooting workplace law/ policy was absolutely "safe" and "complies" with OSHA regulations.

Plaintiffs sought discovery through documents production, interrogatories, request for admissions and depositions concerning substantially similar workplace deaths of OTIS elevator mechanics Christopher Hamelinck in 2015 and James Jacobs in 2019, investigations by OSHA into those deaths, OTIS' knowledge of the dangerous nature of its workplace policies from issued OTIS Patents and OTIS' fraudulent propaganda campaign intentionally misrepresenting its workplace policies were safe, consistent and compliant with OSHA regulations on the same subjects.

On July 17, 2019, the trial court entered an order denying the OTIS Defendants motions to dismiss Plaintiffs Second Amended Complaint previously filed on February 15, 2019. The Second Amended Complaint supplemented the prior claims to include intentional torts including misdemeanor manslaughter, culpable negligence, fraudulent misrepresentation, fraudulent concealment, battery and conspiracy. Plaintiffs subsequently moved for leave of court to amend the second amended complaint adding a claim for punitive damages which was denied by the trial court's order entered June 29, 2020. (App. C pp. 16a-22a)

The OTIS Defendants filed an Answer and Affirmative Defenses to Plaintiffs Second Amended Complaint on August 16, 2019 alleging a comparative negligence affirmative defense to intentional tort claims alleged against both Defendant OTIS and the individual Defendant supervisors. On June 8, 2020, the trial court entered a Judgment on the Pleadings dismissing the comparative negligence affirmative defenses asserted by OTIS against the intentional tort causes of action (Count XIV-battery, count XIII fraudulent misrepresentation, count XV fraudulent concealment, and count XII-conspiracy). In the same order the trial court denied dismissal of comparative negligence affirmative defenses asserted against the intentional tort claims brought against individual OTIS Defendants Duda and DeVincentis.

The Trial Court granted Summary Final Judgment dismissing all claims against all OTIS Defendants on November 8, 2021, while finding Plaintiffs failed to prove by clear and convincing evidence that the workers compensation immunity exception applies to Defendant OTIS and that no genuine issue of material fact existed to defeat corporate immunity. The Court found that OTIS' state law elevator workplace procedures (to access the hoistway to troubleshoot electrical circuitry "live" on a first door floor lock (i.e. without lock-out tag-out) were not virtually certain to result in injury or death when followed. Moreover, the trial court found Myers was properly trained on OTIS' policies and procedures, didn't follow them, knew the risks involved, and OTIS didn't conceal or misrepresent the dangers preventing him from exercising informed judgment. The trial court disallowed consideration of any conflicting proffered Federal preemptive OSHA elevator safety law evidence or reasonable inferences therefrom.

A request for rehearing of the Summary Final Judgment of Dismissal was denied by the trial court on November 16, 2021. Final Judgment of Dismissal of all claims was entered November 18, 2021. Plaintiff thereafter filed a Motion for Rehearing of the Entry of Final Judgment on November 30, 2021. Plaintiffs argued that the trial court erred by misconstruing and misapplying applicable law by totally disallowing consideration of clear and convincing federal preemptive OSHA evidence which did create genuine issues of disputed material facts precluding summary dismissal of Plaintiffs' claims that denied Plaintiff's state and Federal constitutional rights to due process and right to jury trial. The trial court denied the motion because it "reargues the same issues" (i.e., Federal OSHA preemption) presented and denied in the previous Motion for Rehearing of the Summary Judgment order. Appellants filed their Notice of Appeal to the First District on December 15, 2021.

The Per Curiam Affirmed opinion of the Florida First District Court of Appeals was rendered on July 7, 2023. (App. A pp. 1a-2a) The order denying Rehearing and Motion for Opinion by the Florida First District Court of Appeals was entered on August 14, 2023 reprinted in the Appendix hereto.(App. D pp. 23-24a)

REASONS FOR GRANTING THE WRIT

I. The Florida trial and appellate courts erroneously misinterpreted and misapplied constitutional federal supremacy of OSHA laws in dismissing Petitioners wrongful death claim without a jury trial.

II. The Florida trial and appellate courts denied rights of due process and jury trial by erroneously refusing to admit into evidence the OSHA safety laws which superseded the Florida safety laws applicable to elevator safety.

STATEMENT OF THE CASE

The Occupational Safety and Health Act of 1970 was enacted by Congress intending OSHA to reduce work-related injuries by codifying an employer's standard of care through a series of safety and health regulations. OTIS and its employees are duty bound to follow applicable OSHA safety regulations. It is a criminal offense for any employer to willfully violate an OSHA safety standard, rule, regulation or order where that violation causes the death of an employee. Title 29 U.S.C. §666(e). *United States v Doig*, 950 Fl.2d 411,415 (7th Cir. 1991); *United States v Dye Construction Co.*, 510 F.2d 78,83 (10th Cir. 1975)

The OSHA regulation governing access to the hoistway codified in 29 C.F.R. §1910.146 provides the elevator hoistway is deemed a "confined space" which must be evaluated to determine if it poses dangerous conditions that must be mitigated or eliminated before entry by an elevator mechanic to troubleshoot or conduct service or

maintenance. Electricity is a highly dangerous invisible force *Lewis v. Gulf Power, Co.* 201 So.2d 5, 8 (Fla.1st DCA 1987)

The only feasible and failsafe safety practice to eliminate the risk of an elevator mechanic from being struck by, crushed and killed during the procedure of accessing the hoistway to troubleshoot electrical circuitry is by simply first locking out the electrical current before entering the hoistway. In other words, completely "shut off the electrical juice" flowing to the elevator car. Since 1995, that is exactly the requirements of specific safety regulations enacted and enforced by the Federal Occupational and Safety Administration (OSHA) through specific regulations enacted in 29 CFR §1910.146 and 29 CFR §1910.147. It provides that an elevator pit is a "permit required confined space" requiring the hazardous electrical energy to be "isolated" or "locked out and tagged out" (LOTO) before accessing the hoistway to troubleshoot electrical circuitry. It further provides that "push buttons, selector switches and other control circuit type devices are not energy isolating devices."

OTIS' KNOWLEDGE OF EXPLICIT WARNINGS SPECIFICALLY IDENTIFYING KNOWN DEADLY HAZARDS

OTIS was provided explicit warnings from OSHA specifically identifying known deadly dangers of accessing the hoistway to troubleshoot "live" (without LOTO) on electrical circuitry in the hoistway disclosed in the following publications:

(a) OSHA Directive No. CPL 02-00-147 (Eff 2-11-08) entitled "The Control of Hazardous Energy-Enforcement Policy and Inspection Procedures" stating in pertinent parts:

> (i) The control of hazardous energy standard addresses machines and equipment that may expose employees to injury during servicing and/or maintenance activities.
>
> (ii) Some machines and equipment covered by the control of hazardous energy standard include: "Elevators, escalators and passenger conveyors"
>
> (iii) The standard contains definitive criteria for establishing an effective energy control program for the lockout or tagout of energy isolating devices.
>
> (iv) An energy control program includes energy control procedures, employee training, and periodic inspections to ensure that hazardous energy sources are isolated and rendered safe before and while any employee performs any servicing or maintenance on any machinery or piece of equipment. (v) Affected or authorized employees may disable, shut down, or turn off machines or equipment.

> (vi) An "energy isolating device" includes any "device used to block or isolate energy."
>
> (vii) "Push buttons, selector switches, safety interlocks and other control circuit type devices are NOT energy isolating devices."

(b) 29 C.F.R. §1910.146 providing for log out tag out of hazardous energy in permit required confined spaces. (c) 29 C.F.R. §1910.147 providing for devices and procedures for log out tag out of hazardous energy in permit required confined spaces.

(c) OSHA Letters of Interpretation (LI) which constitutes OSHA's interpretation of OSHA "regulation requirements and how they apply to particular circumstances" including:

> (i) LI to "Code and Safety Consultant to NEII (9-19-94) stating "generally speaking". The elevator pit is considered a "confined space."
>
> (ii) LI to Code and Safety Consultant to NEII (12-20-1994) stating "OSHA's position that elevator pits should be considered confined spaces."
>
> (iii) LI to Code and Safety Consultant to NEII (10-27-1995) stating "elevator pits generally are permit required

> confined spaces by virtue of the electrical-mechanical hazard(s)... It is our understanding that the pit stop switch would not lock-out [isolate] the elevator since it is not a main electrical energy disconnect; the main disconnect to elevator equipment would have to be used or locked or tagged to accomplish an electrical de-energization".

An employer cannot substitute its own judgment for the requirements of an express OSHA regulation on its belief that its practice in violation of OSHA regulations is safe. *Western Waterproofing Co. v Marshall*, 576 F.2d 139, 143 (8th Cir 1978) (An employer's substitution of its own judgment for the requirements of an OSHA regulation is evidence of intentional disregard or plain indifference to the regulation.)

Any employer including OTIS may not fail to make its supervisors or employees on the job site aware of OSHA regulations. *Georgia Electric Co v Marshall*, 595 F.2d 309, 319-320 (5th Cir. 1979) (indifference to a specific hazard can be evidence of conscious disregard or deliberate indifference to the law).

OTIS TROUBLESHOOTING POLICY

OTIS' company conflicting policy implementing state elevator safety law on pit access in the "OTIS Employee Safety Handbook" entitled "9.0 PIT SAFETY" provides in pertinent part:

9.3 Working in the Pit.... "Entering the pit through the lowest landing door will only be permitted when two independent means of securing the elevator are available and confirmed. For example, the use of emergency stop switch and opening of the door lock."

* * * *

9.9 Confined Space and Elevator Pits... "Elevator pits generally are not classified as permit required confined spaces...." OTIS workplace policy and practice codified in its "OTIS Environmental Health & 16 Safety Weekly Training Manual (2016) titled "6.0 Electrical Energy Live Troubleshooting" provides as follows:

6.1 Lockout and Tag out: Control of Hazardous Electrical Energy – General Rules

* * *

"If troubleshooting or testing must be performed with the power "ON," refer to Electrical Safe Work Practices, Section 6.2. Once the problem is identified, shut off power and lockout before performing repair."

6.2 Electrical Safe Work Practices

* * *

> "Troubleshooting on Live Electrical Equipment: "Troubleshooting live is NOT "working live". Testing and troubleshooting may be done. But repairs or service must only be done after the system or equipment as been properly locked, tagged and verified. When the task requires live troubleshooting, steps must be taken to prevent inadvertent contact with electrical equipment. Many serious incidents and fatalities have occurred as a result of failure to use safe work practices."

OTIS' "Company LOTO Policy" in 2015-2017 further erroneously states: "The Company policy & procedures regarding LOTO are found in Section 6.0 of the latest Employee Safety Handbook. The company program outlined in the handbook meets the OSHA regulatory requirements for LOTO. Any deviation from this policy is an OSHA and company violation that is subject to discipline up to and including termination."("We comply with all EH&S laws worldwide.")

OTIS Vice President for Environmental Health & Safety Robert Rodriguez testified: "A. Counselor, our employees are allowed to troubleshoot electrical circuitry with the power on. Q. In the hoistway? A. Yes"; Appellant Myers supervisor Louis DeVincentis statement under penalty of perjury provided in OSHA's investigation testified: "under certain circumstances my employees are allowed to enter elevator #17's door interlock and emergency e- stop switch to control the electrical energy to that elevator (#17). The employees would not need to conduct a lock out tag out condition at the elevators rooftop machine room isolating switch."

I. The Florida courts erroneously failed to apply constitutional federal supremacy of OSHA laws in dismissing Petitioners wrongful death claim without a jury trial.

OTIS TROUBLESHOOTING POLICY CONFLICTS WITH AND VIOLATES SUPERSEDING OSHA REGULATIONS

The Trial Court rejected Petitioner's contention that OTIS' written workplace policies and practices conflict with and fail to comply with the preemptive applicable OSHA regulatory requirements governing hoistway access to eliminate the known deadly dangerous risks posed by troubleshooting "live" on electrical circuitry in the hoistway in three respects. "OTIS' interpretation of a confined space was in direct conflict with the OSHA definition of a confined space as listed in 29 CFR 1910.146 (b)").

First, OTIS' interpretation of a confined space was in direct conflict with the OSHA definition of a confined space as listed in 29 CFR 1910.146 (b)").

OSHA does in fact classify elevator pits as permit required confined spaces. OTIS knowingly and erroneously trained its elevator mechanics that elevator pits were not confined spaces requiring hazard mitigation by LOTO.

Second, OSHA does not recognize the use of pit stop switches and door lock switches as "energy isolating devices". Published OSHA regulations clearly so state in 29 C.F.R. §1910.147. OTIS erroneously trained its

elevator mechanics that the "twin switches"(pit stop and lower door lock) were OSHA approved and safe because they provided redundant safety protection. In fact, the "emergency e- stop pit switch" only operates to divert, not isolate, the electrical energy from the elevator car to the brakes. Moreover, OTIS knew that since the very purpose for troubleshooting elevator #17 was to repair an already dysfunctional first door electrical floor lock there would be no "redundant" safety procedure in effect. OTIS knew it was reasonable to expect the elevator mechanic would suffer serious injury or death troubleshooting "live" in the hoistway unless saved solely by activation of an inherently faulty pit stop switch. In fact, Myers did "push in to stop" the pit stop switch which did not in fact stop the elevator car from descending twice to strike, crush and kill him.

Third, superseding conflicting OSHA regulations do not permit access to the hoistway to troubleshoot "live" without LOTO under any exceptions created by OTIS.

APPELLANT MYERS DEATH CAUSED BY KNOWN DANGEROUS WORKPLACE TROUBLESHOOTING POLICY

At 5:00 a.m. on February 17, 2017, Appellant Myers was dispatched to troubleshoot and repair TMH POB elevator #17 which was reported to be dysfunctional with its door opening and closing indiscriminately. OTIS trained Myers to follow OTIS' troubleshooting state law elevator safety workplace policy which OTIS knew was in conflict with OSHA LOTO elevator safety standards for accessing the hoistway to troubleshoot electrical circuitry. OTIS knowingly and erroneously told Myers that OTIS' troubleshooting policy allowed him to access the hoistway

without LOTO and was consistent and compliant with OSHA regulations. A surveillance recording showed Myers entering and exiting the elevator pit hoistway 10 times over 15 minutes. Myers was seen on several occasions to engage the pit stop switch in the "push in to stop" position. At 5:15 a.m., Myers entered the hoistway for the last time. While inside the hoistway pit area, elevator #17 ascended twice and descended twice striking, crushing and killing Myers who appeared to be seeking refuge by standing inside the top rung of the pit ladder.

APPELLANT MYERS DID FOLLOW OTIS' DANGEROUS WORKPLACE TROUBLESHOOTING POLICY

OTIS' state elevator safety law troubleshooting policy required Appellant Myers to engage the emergency E-stop pit switch in the "stop" position when accessing the elevator #17 hoistway to troubleshoot "live" on electrical circuitry. When first responders retrieved Myers body they saw the emergency E- stop pit switch which was engaged in the "push in to stop" position. Medical Examiner Dr. Lisa Flanagan executed an affidavit on September 15, 2021, stating "There is no physical evidence on his (Myers) body that allows me to definitely state that he came into contact with the switch. I would defer that question to the scene investigator who documented the position of his body at the scene". First responder Tallahassee Police Officer Jerome Megna testified in deposition on July 26, 2018 that he did not observe any physical evidence that Myers body came into contact with the emergency E-stop pit switch causing it to be pushed in the "stop" position... . The physical evidence shows Appellant Myers was struck twice by elevator # 17. There is no physical evidence that

the body of the dead man was crushed against the pit stop switch causing it to be in the "push in to stop" position after either the first or second collision with elevator car #17. Rather the physical evidence shows that Appellant Myers did follow OTIS' policy to push the pit switch "into stop" since Myers was the last person seen to touch the switch.

PRIOR AND SUBSEQUENT SIMILAR ACCIDENTS

OTIS ' actual knowledge of the imminent deadly danger to the elevator mechanic presented by its unreliable "redundant device" mitigation workplace practice was informed by a series of substantially similar incidents including the serious hoistway injuries suffered by OTIS elevator mechanic Kenneth Nauholz in 2009 (762 F.3d 116 (D.C. Cir. 2014), the hoistway death of OTIS elevator mechanic Christopher Hamelinck in 2015, the hoistway death of OTIS elevator mechanic Robert Myers in 2017 and the hoistway death of OTIS elevator mechanic James Jacobs in 2019. In each of these incidents, OSHA did investigate, did make factual findings and conclusions, and did issue "serious" citations of substantially similar OSHA regulation violations of 29 CFR §1910.146 (pit access) and 29 CFR §1910.147 (lock out- tag out) alleged to have knowingly caused the injuries and deaths. Otis contested the citations in each case. The OSHA investigations included inspections of the workplaces, gathering of witness statements under penalty of perjury, making findings of fact, and issuance of citations of regulation violations. OSHA investigator Nolan Houser testified he made a finding of fact from the evidence collected that the workplace death of Appellant Myers occurred "in near

exact manner" to the workplace death of Otis elevator mechanic Christopher Hamelinck in 2015.

DELIBERATE CONCEALMENT AND MISREPRESENTATION OF THE DANGER

After each incident, OTIS denied knowledge that its workplace policies and practices presented imminent deadly dangerous workplace conditions or hazards to its injured and deceased elevator mechanics Nauholz, Hamelinck, Myers and Jacobs. OTIS distributed companywide safely bulletins and alerts ("Remembrance Day", "Lessons Learned", "NAA Safety Alert" and "Learn and Live") repeating the intentional falsehood that its policies were "safe" and "compliant and consistent" with OSHA regulations on the same subjects knowing that OSHA repeatedly cited Otis for serial violations of those same OSHA regulations. OTIS told its elevator mechanics "Our pit access procedures are in place to protect all employees from hoistway risks. They are tested and verified to be effective." OTIS' Employee Safety Handbook stated, "its safe practices" are the result of "experience of OTIS personnel in the industry" and "represents the safest and most efficient way of doing the job". Following Hamelinck's death, OTIS told its elevator mechanics and the public that " OTIS stands behind its policies and procedures with respect to employee safety and training and believes they are consistent with applicable OSHA regulations." Following Myers death OTIS stated to its mechanics that its "access procedures were in place to protect all employees from hoistway risks" and "are tested and verified to be effective". OTIS told the Tallahassee public TV station WTXL "OTIS' safety policies practices and training are designed to comply with OSHA standards

and OTIS believe this will be borne out during the (contest) review process." OTIS has not changed or abated its Pit access and LOTO policies even after three deaths of elevator mechanics in 2015, 2017, and 2019, except to drop the "15 minute rule" which postponed access to the pit without LOTO for 15 minutes.

EVIDENCE OF DANGEROUS CONDITION AND UNSAFE PRACTICES

Prior to Appellant Myers death, OTIS had actual knowledge from several sources including OSHA and the elevator industry organization NEII that OTIS' pit access and LOTO policies and practices were in conflict with preemptive applicable mandatory OSHA regulations on precisely the same subjects. OSHA did investigate, gather evidence and make findings of fact disclosing to OTIS that its pit access and LOTO practices were in direct violation of applicable OSHA regulations in the Nauholz, Hamelinck, and Myers' workplace deaths. OTIS stipulated to citations in Hamelinck which concluded OTIS' pit access and LOTO policies did not comply with OSHA regulations and that OTIS pledged to "follow applicable law and will train employees accordingly. OTIS did not comply to conform its pit access troubleshooting policies with OSHA. Rather, Appellant Myers was told to continue accessing the elevator pit without LOTO and troubleshoot "live" while using the prohibited emergency E-Stop Pit switch and lower door floor lock as mitigation switches banned for such use by specific OSHA regulations. Neither switch was an "energy isolating device" nor did they work to protect Myers from being struck by, crushed, and killed when the elevator descended upon him. OSHA investigator Houser testified he made a finding of fact that Myers died in "near

exact manner" as did Hamelinck. The pit stop switch doesn't function to isolate the energy. Instead, it diverts the energy to the brakes instead of the elevator car.

INTENTIONAL DISOBEDIENCE OF FEDERAL PREEMPTIVE OSHA REGULATIONS

OTIS was also provided explicit warnings through its membership as a founding member of the National Elevator Industry Inc (NEII) of the same deadly dangers of accessing the hoistway to troubleshoot "live" (without LOTO) on electrical circuitry in the hoistway as disclosed in the following:

> (a) NEII's disclosure to OTIS on "OSHA Confined Space Regulations as they pertain to Elevator Pits" (approved 3-15-01, Revised 9-12-07 and Reaffirmed 2-4-2014) stating:
>
> > "Although the elevator industry will generally work with a customer to meet its expectations regarding the safety and health at a job site, it does not accept the wholesale designation of elevator pits as permit required confined spaces under OSHA's general industry-standard, 29 CFR §1910.146"
>
> (b) NEII disclosure to OTIS on "NEII History" (2017) stating: "As OSHA ramped up in 1973, NEII members In Cooperation with Elevator World developed the first Elevator Industry Field Employee Safety Handbook. This action prompted NEII To Establish the Safety

Committee formed to "develop implement and maintain an efficient, accident-free environment for employees and the elevator industry. In 1976 the NEII safety committee approached elevator world with a proposal to update the 1973 Safety Handbook. Elevator World published a new edition, in exchange for a commitment from the NEII member companies to use the Elevator Industry Field Employee Safety Handbook. A partnership was formed and the NEII Safety Committee authored new editions of the Safety Handbook Published by Elevator World in 1977, 1983, 1986, 1991, 1995, 2000 and 2005."

(c) OTIS was a 1969 founding member of NEII and has continuously remained a member of NEII. OTIS President Tom Vining served on the Board of Directors of NEII in 2017 and as president of the NEII in 2018-2019. OTIS VP Robert Rodriguez served on the NEII Field Employee Safety Committee in 2017

OTIS' INTENTIONAL REFUSAL TO MAKE WORKPLACE SAFE FROM KNOWN DANGERS

After the death of Christopher Hamelinck in 2015 and prior to Robert Myers death in 2017, OTIS published a "New Safely Enhancement" called "Access Alert" in the elevator industry periodical "Elevator World" OTIS contended that elevator mechanics sometimes "forgot" to activate the pit stop switch upon accessing the hoistway to troubleshoot as OTIS previously explained was causing the deaths of elevator mechanics. The safety device worked "similar to the seatbelt alarm found in a car, an alarm

sounds when anyone enters the hoistway. The alarm continues to sound until it is physically switched off ...

To silence the alarm, the technician must push the silence button at the same time as the inspection station button." OTIS said that would stop movement of the elevator car. OTIS claimed "Access Alert is going to make a significant impact on the entire elevator industry. There are times that people get caught up with everything and forget to take each and every safety precaution." OTIS did not install the "Access Alert" safety device on Elevator #17 that killed Robert Myers. OTIS knew it had a duty to "follow safe work practices by a "retrofit" on Elevator #17 with the safety device. OTIS' Instructions to the "Access Alert" device describes its purpose as a "Hoistway Safety Device Retrofit Package" which was "used to improve safety on new and older elevator systems without a control system upgrade. OTIS did retrofit the safety device after Myers' death which is evidence of knowledge of dangerous condition and failure to make the workplace safe . Plaintiffs' experts John Koshak and William Seymour testified that OTIS' failure and refusal to provide the Access Alert safety device on elevator #17 was "reckless" conduct and that the safety device on elevator #17 would likely have saved appellant Myers life.

OTIS SUPERVISORS DUDA AND DEVINCENTIS CULPABLE NEGLIGENCE CONDUCT

The trial court erroneously determined that OTIS' troubleshooting policy was safe and compliant with OSHA although repeated investigations by OSHA disclosed the claims were knowingly false. OSHA investigator Nolan Houser testified that OTIS supervisors Duda and

DeVincentis "trained, authorized and established work practices which allowed service mechanic Myers to enter the elevator hoistway pit area without being in compliance with OSHA standards…". OTIS supervisors Duda and DeVincentis either had or should have had a heightened awareness of the imminently deadly dangerous hazards of troubleshooting "live" in the hoistway without LOTO considering OTIS experienced two fatalities in two years "In near exact manner." These Defendant OTIS supervisors recognized that elevator #17 was dangerously capable of unintended movement but "they did not control it properly." The Defendant OTIS supervisors also knew or should have known that the use of dual switches (emergency E-stop pit switch and lower door floor lock) was not permitted "energy isolating devices" capable of eliminating the known struck by/crush hazards. Defendants Duda and DeVincentis directed Myers to troubleshoot in a known imminently deadly dangerous hoistway without LOTO or feasible available mitigation of the known deadly hazards upon pain of discipline including termination of employment.

OTIS' TROUBLESHOOTING POLICY PRESENTS AN ONGOING "PUBLIC HAZARD"

When elevator #17 descended the second time striking Appellant Myers, there were three occupants exposed to danger while inside the elevator car for over an hour and a half Previously, on October 18, 2016, the TMH POB elevator #19 malfunctioned by stopping short of the floor level when the door opened, and Dr. Romana's postoperative spine patient fell down into the elevator car and was injured. Dr. Romana filed a formal complaint about the "unacceptable maintenance of the elevators."

A personal injury lawsuit against TMH was filed by the injured patient alleging negligence against TMH and OTIS.

II. The Florida courts erroneously refused to admit into evidence the OSHA safety laws which superseded the Florida safety laws on elevator safety.

The admissible record evidence presented clear and convincing facts and reasonable inferences that the OTIS Defendants committed criminal intentional torts which they knew were virtually certain to cause serious injury or death and did cause substantially similar workplace deaths before, after and including the Appellant's death.

The trial court failed and refused to apply preemptive federal OSHA law and regulations by erroneously disallowing application of any and all OSHA evidence for any purpose whatsoever. The trial court further erred by refusing to allow claims for punitive damages to proceed by misapplying and misinterpreting applicable rules of law and instead giving absolute priority to the affirmative defense of workers compensation immunity as a "threshold" consideration.

In justifying the Final Judgment dismissal, the Trial Court did misapply and erroneously enforce OTIS' conflicting State of Florida elevator safety policies on troubleshooting "live" in the hoistway without LOTO. At the same time, the Trial Court did also disallow in evidence the more stringent preemptive conflicting federal OSHA safety standards applicable to the minimum safe mode of troubleshooting in the hoistway.

This was emphasized initially by the trial court in its Order Denying Plaintiffs Motion for Leave of Court to Amend the Second Amended Complaint Adding a Claim for Punitive Damages wherein the Court declared: "Plaintiff relies heavily on OSHA violations as evidence in support of her claim for punitive damages against all Defendants. The admissibility and relevancy of said violations is questionable. See Boatwright v Sunlight Foods Inc. 592 So. 2d 261 (Fla. 2d DCA 1992) (holding that OSHA's determination of who employed decedent and evidence of the fine levied by OSHA is irrelevant and inadmissible.) The court subsequently reiterated that same disdain for OSHA evidence in its Order Granting Summary Judgment wherein the Court stated: "Plaintiff continues to focus on OSHA violations, Access Alert, and patents that never reach the development stage to prove her case – all of which this Court has previously advised are inapplicable. See 6/29/20 Order Denying Plaintiffs Motion for Leave of Court to Amend Second Amended Complaint Adding Claim for Punitive Damages" and Order Granting Defendants Motion for Final Summary Judgment. (App. C pp. 16a-22a)

By disallowing all OSHA evidence, the Trial Court Final Judgment did deprive the Plaintiffs of their Federal and State constitutional rights to due process, access to courts, and jury trial by misinterpreting and misapplying applicable federal law requiring the state court to enforce preemption of federal OSHA safety law to supersede Florida state law on the same subjects. 7th, 14th Amend. U.S. Const., Art. I § 7, 9, 22 Fla. Const.

The Trial Court further denied federal Fourteenth Amendment substantive and procedural due process by

dismissing all claims which were required to be tried by jury because they were supported by disputed genuine issues of material fact created in part by the excluded conflicting OSHA evidence. Under Federal law the OSH Act of 1970 has pre-empted any attempt by the State of Florida to authorize or establish industry safety standards that conflict with and are below those set by OSHA. The U.S. Constitution Supremacy clause in Article VI Section 2 declares that Federal law is "the supreme law of the land." As a result, when a federal law conflicts with a state or local law, the Federal law will supersede the state law or laws. This is commonly known as conflict "preemption."

The legal framework for determining whether a state provision is preempted is set out in the Supreme Court of the United States decision in *Gade v. National Solid Wastes Management Association*, 505 U.S. 88 (1992). The *Gade* decision has been cited with approval by the First District in *West Florida Regional Medical Center v. See*, 18 So. 3d 676 (Fla. 1st DCA 2009), aff'd 79 So. 3d 1 (Fla 2012). In Gade, the U.S. Supreme Court was presented with a substantially similar issue with which the trial court in the case at bar was also presented. It involved precisely the same "29 CFR §1910" industry safety code regulation promulgated by OSHA pursuant to the OSH Act. The Supreme Court considered whether conflicting Illinois laws requiring licensing and training for workers handling hazardous waste was preempted by the OSH Act and existing Occupational Safety and Health Administration (OSHA) safety standards. Specifically, OSHA's Hazardous Waste

Operations and Emergency Response (HAZWOPER) Standard, 29 C.F.R. § 1910.120, requires various levels of training for employees handling hazardous waste or

responding to a catastrophic release of chemicals. Section 18(b) of the OSH Act allows states to assume jurisdiction over workplace safety and health by submitting a plan for approval by Federal OSHA. State plans enforce safety and health standards in the state which is permitted to adopt its own standards. Twenty-two states have obtained approved state OSHA plans. Illinois was not one of those states when *Gade* was decided. Neither has Florida ever had an OSHA approved state plan covering private sector employee.

In the instant case, as in *Gade*, the State of Florida has established dual impact state safety regulations followed by OTIS allowing access to the hoistway to troubleshoot electrical circuitry "live" on elevators without requiring lock out/ tag out (LOTO). These state regulations do directly and irreconcilably conflict with previously adopted OSHA safety regulations that prohibit troubleshooting in the hoistway "live" without LOTO.

The application of "*Gade* preemption of OSHA safety regulations" over competing state law safety regulations on the same subjects further reinforces the justification for admission of the OSHA evidence in the case at bar to establish the existence of genuine issues of disputed material fact on duty, proximate causation, and industry custom and practice. Importantly, none of the cases relied upon by the trial court in the case at bar (*Turner v PCR, Boston v Publix, List v Dalien, LaFreniere v Myers, Feraci v Grundy, Pendergrass v Michaels, Boatright v Sunlight, Folds v JA Jones*) even mentioned or discussed applicability of "*Gade* preemption of OSHA safety regulations" in determining the relevancy or admissibility of OSHA related evidence.

CONCLUSION

For these various reasons this petition for writ of certiorari should be granted. Federal OSHA law is the "supreme law of the land." Refusal to admit OSHA evidence into evidence does deny Petitioner's rights to federally protected constitutional due process of law. Florida Courts cannot enforce their own state version of safety laws preempted by federal law. Florida has never lawfully adopted its own federally reviewed and approved FLA-OSHA as California and other states have done. The imposition by Florida Courts of less stringent elevator safety laws which have resulted in three "near exact manner" deaths of elevator mechanics cannot be tolerated especially where Florida Courts flout the federal supremacy of safety laws which would surely have saved lives if they had been properly enforced.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

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APPENDIX A — ORDER OF THE FIRST DISTRICT COURT OF APPEAL STATE OF FLORIDA, DATED JULY 7, 2023

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-3838

CATHERINE CRAIG-MYERS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT MYERS, DECEASED,

Appellant,

v.

OTIS ELEVATOR COMPANY, A CONNECTICUT FOR PROFIT CORPORATION; LOUIS CARL DEVINCENTIS, INDIVIDUALLY AND AS AN EMPLOYEE OF OTIS ELEVATOR COMPANY; JAMES DUDA, INDIVIDUALLY AND AS AN EMPLOYEE OF OTIS ELEVATOR COMPANY,

Appellees.

On appeal from the Circuit Court for Leon County.
Angela C. Dempsey, Judge.

July 7, 2023

PER CURIAM.

AFFIRMED.

RAY, WINOKUR, and NORDBY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

APPENDIX B — ORDER OF THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT OF FLORIDA, LEON COUNTY, FLORIDA FILED NOVEMBER 8, 2021

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT OF FLORIDA, LEON COUNTY, FLORIDA

CASE NO.: 2017 CA 2239

CATHERINE CRAIG-MYERS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT MYERS,

Plaintiff,

v.

OTIS ELEVATOR COMPANY, A CONNECTICUT FOR PROFIT CORPORATION; LOUIS CARL DEVINCENTIS, INDIVIDUALLY AND AS EMPLOYEE OF OTIS ELEVATOR COMPANY; JAMES DUDA, INDIVIDUALLY AND AS EMPLOYEE OF OTIS ELEVATOR COMPANY,

Defendants.

November 8, 2021, Decided;
November 8, 2021, Filed

Appendix B

ORDER GRANTING DEFENDANTS' MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE came to be heard before the Court on October 14, 2021, for a hearing on Defendants' Motion for Final Summary Judgment. The Court having carefully reviewed and considered the foregoing Motion, Plaintiff's Response in Opposition to Defendants' Motion, and after hearing argument of counsel, and the Court being otherwise advised in the Premises, it is hereupon **ORDERED and ADJUDGED**:

Defendants' Motion for Final Summary Judgment is hereby GRANTED AS TO ALL COUNTS, as follows:

Workers' compensation is the exclusive remedy for accidental injury or death arising out of work performed during the course and scope of employment. Sec Section 440.11, Fla. Stat. and *Turner v. PCR, Inc.*, 754 So 2d 683 (Fla. 2000). There are very few limited exceptions to this immunity. Plaintiff's Second Amended Complaint seeks to impose liability against Otis Elevator Company ("Otis") under the Intentional Ton Exception (Employer Exception) to workers' compensation, against James Duda ("Duda") and Louis Car) DeVincentis ("DeVincentis") wider the Criminal Acts Exception to workers' compensation, and against Duda and DeVincentis under the Fellow Employee Exception to workers' compensation. The admissible evidence submitted by the parties shows there is no genuine dispute as to any material fact and that Defendants are entitled to workers' compensation immunity and therefore judgment as a matter of law.

Appendix B

FINDINGS OF FACT

1. On February 17, 2011, Robert Myers, was employed by Otis as an elevator service mechanic.[1] Mr. Myers became a licensed elevator mechanic in 2009 and was recertified and received his Certificate of Competency, as a certified licensed elevator mechanic, as recently as November 2016.[2]

2. During Mr. Myers' approximately 14 years of total employment with Otis, he underwent extensive training, including but not limited to. training courses concerning pit/hoistway access, as well as specific training on 'how to troubleshoot a first-floor door lock', the task he was performing on the date of incident. In the year prior to the incident, Mr. Myers underwent specific training regarding troubleshooting first-floor door locks, including fatality prevention training specific to this work, during which Mr. Myers was made aware of the risk of injury or death if Otis' Troubleshooting Policies and Procedures were not followed while troubleshooting a first-floor door lock.[3]

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1. *See* Second Amended Complaint.

2. *See* Department of Business and Professional Regulation, www.myfloridalicense.com; *See also* 11/30/16 Certificate of Competency, attached as Exhibit A.24, to Defendants' Motion for Final Summary Judgment.

3. *See* Deposition Transcript of Louis DeVincentis, 7/31/18, at 60:20-61:12; 87:2-13; 94:11-18. *See also* Deposition Transcript of Robert Rodriguez, Otis Corporate Representative, 2/2/20, at 68:2-17; 73:19-74:5; 94:11-20; 120:22-121:5; 121:7-122:1; *See also* Deposition Transcripts of William Seymour, Plaintiff's Expert Witness, 1/29/21 and 6/11/21, at 153:23-154:15; 155:3-15; 183:17-21; 255:9-13; 258:1-259:19; 264:4-265:9); *See also* Deposition Transcript

3. During the two-year period preceding the subject incident. Mr. Myers was the route mechanic at the Tallahassee Memorial Hospital ("TMH"), including the Professional Office Building located within TMH.[4] As the route mechanic for TMH, Mr. Myers had extensive experience maintaining and servicing all the elevators at TMH, including the subject elevator.[5] At no time during the two year period that Mr. Myers was the route mechanic for TMH, did he suffer any accidents/incidents, despite servicing TMH's elevators on more than 1,000 occasions.[6]

4. On the date of the incident, February 17, 2017, Mr. Myers, in his capacity as an Otis employee, was troubleshooting the first-floor door lock on the subject elevator (Elevator Number 17), at the TMH Professional

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of James Duda, 7/31/18, at 22:13-25:2; 27:13-28:4; 35:22-36:2: *See also* Deposition Transcript of John Koshak, Plaintiff's Expert Witness, 9/10/20, at 176:7-14; 189:1-2,6-8, 19-23; 250:1-6; 251:1-24; 252:1-2; 254:4-13; 256:12-15; 263:2-5, 13-23; *See also* Deposition Transcript of Catherine Craig-Myers, 12/20/19, at 23:13-23; 25:20-26:4; *See also* Otis' trainings and fatality prevention audits, attached as Exhibits A.8-A.16, to Defendants' Motion for Final Summary Judgment; *See also* Otis' Employee Safety Handbook, attached as Ex. A.21, to Defendants' Motion for Final Summary Judgment.

4. *See* Deposition of Louis DeVincentis, 7/31/18, at 23:18-21. *See also* Deposition of James Duda, 7/31/18, at 125:22-126:11.

5. *See* Declaration of Louis DeVincentis, attached as Exhibit A.28 to Defendants' Motion for Final Summary Judgment. *See also* Deposition Transcript of James Duda, 7/31/18, at 125:22-126:11.

6. *See Id. See also* Deposition of Louis DeVincentis, 7/31/18, at 121:14-24.

Office Building.[7] During the course of troubleshooting the first-floor door lock, Mr. Myers was tragically killed when he was struck by Elevator Number 17 inside the hoistway. While the precise details of what occurred inside the hoistway are unknown, the undisputed material facts confirm Mr. Myers was performing work in violation of Otis' Troubleshooting Policies and Procedures at the time of his death, which required the work to be performed from inside the elevator itself and for Mr. Myers to have properly taken control of the elevator car prior to performing any troubleshooting work.[8]

5. In the eight years prior to Mr. Myers' death, there were no similar instances of an Otis elevator service mechanic being injured while servicing or maintaining the Elevator Number 17, any other elevator at TMH, nor any other elevator within the Tallahassee region.[9]

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7. *See* Declaration of Louis DeVincentis attached as Exhibit A.28 to Defendants' Motion for Final Summary Judgment. *See also* Deposition Transcript of Robert Rodriguez Otis Corporate Representative, 2/2/20, at 67:19-24; *See also* Deposition Transcript of James Duda, 7/31/18, at 44:24-45:17.

8. *See* Deposition Transcript of Robert Rodriguez, Otis Corporate Representative, 2/2/20, at 68:2-17; 73:19-74:5; 94:11-20; 120:22-121:5; 121:7-122:1. *See also* Deposition Transcript of Louis DeVincentis, 7/31/18, at 60:20-61:12; *See also* Deposition Transcript of James Duda, 7/31/18, at 35:22-36:2; *See also* Deposition Transcript of Lee Rigby, OSHA Expert Witness, 9/20/18, at 62:25-63:2; 63:21-25; 70:19-71:10; *See also* Deposition Transcript of John Koshak, Plaintiff's Expert Witness, 7/16/20, at 62:5-12, 19-23; 176:7-14; *See also* Deposition Transcripts of William Seymour, Plaintiff's Expert Witness, 1/29/21 and 6/11/21, at 251:7-10.

9. *See* Deposition Transcript of Louis DeVincentis, 7/31/18, at 21:22-22:6; 110:18-23; 121:14-24. *See also* Deposition of James Duda, 7/31/18, at 122:15-123:3.

6. When followed, Otis' Troubleshooting Policies and Procedures are not "virtually certain" to result in injury or death, in fact, the material evidence confirms that no one (including Plaintiff's own liability experts) is aware; of a single accident/incident occurring when Otis' Troubleshooting Policies and Procedures are followed.[10]

7. At the lime of Mr. Myers' accident Duda was the branch manager for Otis' Tallahassee branch and DeVincentis was a maintenance supervisor. Neither Duda nor DeVincentis have ever been Otis corporate officers. Duda and DeVincentis were not present when Mr. Myers' incident occurred. At all times material, Duda and DeVincentis acted within the course and scape of their employment with Otis and were mi involved in creating Otis' Troubleshooting Policies and Procedures. Their jobs relative to Otis' Troubleshooting Policies and Procedures was to ensure the Otis mechanics in the Tallahassee branch were trained on Otis' said Troubleshooting Policies and Procedures, with the material facts confirming that this was done relative to Mr. Myers.[11]

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10. *See* Deposition Transcript of John Koshak, Plaintiff's Expert Witness, 7/16/20, at 176:7-14: 313:7-12. *See also* Deposition Transcripts of William Seymour, Plaintiff's Expert Witness, 1/29/21 and 6/11/21, at 153:23-154:15; 155:3-15; 183:17-21; *See also* Deposition Transcript of Lee Rigby, OSHA Expert Witness, 9/20/18, at 56:12-22; 57:12-58:21; *See also* Deposition Transcript of Robert Rodriguez, Otis Corporate Representative, 2/2/20, at 121:7-122:1. Another service mechanic died in New York in 2015 in a hydraulic elevator under different circumstances. TMH's elevator 17 in a traction elevator, however Robert Myers and all Otis mechanics received extensive training on the danger present in their line of work.

11. *See* Deposition Transcript of Louis DeVincentis, 7/31/18 at 7:16-25; 10:23-11:2; 12:2-5; 69:25-70:3; 98:17-19; 117:25-118:2, 6-11,

8. Robert Myers was an employee of Otis at the time of the tragic workplace incident on February 17, 2017.[12] As such, Section 440.11, Fla. Stat. is the exclusive remedy and applies to any causes of action asserted against Otis, the employer, and Duda and DeVincentis, co-employees.

CONCLUSIONS OF LAW

Summary judgment is appropriate pursuant to Florida Rule of Civil Procedure 1.510 "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *In re Amendments to Florida Rule of Civil Procedure 1.510*, 46 Fla. L. Weekly S6 (Fla. Dec. 31, 2020) (quoting *Celotex Corp. v. Catrett*, 477 U.S, 317, 322 (1986)). Where a party opposing a motion for summary judgment presents evidence that is "merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986)). Here, Plaintiff has not made an adequate showing to overcome the threshold issue of workers'

14-23. *See also* Deposition Transcript of James Duds, 7/31/18, at 7:19-22; 9:15-21; 39:15-16; 49:8-9; 89:9-12; 94:11-14; 120:5-121:2; *See also* Deposition Transcript of John Koshak, Plaintiff's Expert Witness, 9/10/20, at 374:20-22; 376:12-19; *See also* Deposition Transcripts of William Seymour, Plaintiff's Expert Witness, 1/29/21 and 6/11/21, at 185:15-20; 191:11-25; 291:9-292:4: 294:14-298:19; 329:17-330:25; *See also* 6/29/20 Order Denying Plaintiff's Motion for Leave of Court to Amend Second Amended Complaint Adding Claim for Punitive Damages.

12. *See* Second Amended Complaint at ¶85.

compensation immunity protections pursuant to Section 440.11(1), Fla. Stat. *See Coney v. Int'l Minerals & Chem, Corp.*, 425 So. 2d 171, 173 (Fla. 2d DCA 1983) ("[W]e hold that the exclusiveness of remedy doctrine embodied in Section 440.11(1) bars recovery against CMC for either compensatory or punitive damages.").

I. OTIS — INTENTIONAL TORT EXCEPTION (EMPLOYER EXCEPTION)

Plaintiff has not proven, by clear and convincing evidence, that the Intentional Tort Exception (Employer Exception) to Otis' workers' compensation immunity applies, and has not established that any genuine issues of material fact exist as to the same.[13] *See Boston ex rel Estate of Jackson v. Publix Super Markets, Inc.*, 112 So. 3d 654, 657 (Fla. 4th DCA 2013) (A plaintiff must establish that an employer's conduct be "virtually certain to result in injury or death in order to overcome immunity.") *See also List Industries, Inc. v. Dalien*, 107 So., 3d 470, 471 (Fla. 4th DCA 2013); *LaFreniere v. Craig-Myers*, 264 So. 3d 232, 239-240 (Fla. 1st DCA 2018).[14] To overcome

13. Plaintiff continues to focus on OSHA violations, Access Alert, and patents that never reached the development stage to prove her case — all of which this Court has previously advised are inapplicable. *See* 6/29/20 Order Denying Plaintiff's Motion for Leave of Court to Amend Second Amended Complaint Adding Claim for Punitive Damages. Consistent with the foregoing, this Court makes no finding as to either the existence of or instillation of an after-market part, as that is immaterial to the workers' compensation issues presented to this Court.

14. Plaintiff continues to cite *McCain v. Florida Power Co.*, 593 So. 2d 500 (Fla. 1992), a non-workers' compensation negligence case

immunity, a plaintiff must prove ail three of the following elements by clear and convincing evidence: (1) The employer engaged in conduct that it knew, based on similar accidents or on explicit warnings specifically identifying a known danger, was virtually certain to result in injury or death to the employee; (2) The employee was not aware of the risk because the danger was not apparent; and (3) The employer deliberately concealed or misrepresented the-danger so as to prevent the employee from exercising informed judgment about whether to perform the work. *See Boston*, 112 So. 3d at 657. "Failure to prove any one of (these elements) will prevent the exception from applying." *Id.*

Consistent with the findings of fact set forth above, as applied against the applicable legal precedent governing this issue, this Court finds:

(A) Otis' Troubleshooting Policies and Procedures are not virtually certain to result in injury or death when followed.

(B) Robert Myers did not follow Otis' Troubleshooting Policies and Procedures on the date of incident.

(C) There are no prior similar instances of an Otis elevator service mechanic being injured while servicing or

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(addressing proximate causation in negligence eases), as being the correct standard to utilize when evaluating Otis' potential liability. This Court has already advised Plaintiff McCain is the incorrect standard to utilize. *See* 6/29/20 Order Denying Plaintiff's Motion for Leave of Court to Amend Second Amended Complaint Adding Claim for Punitive Damages.

maintaining any elevators within the Tallahassee region, including the subject elevator or any other elevator at Tallahassee Memorial Hospital, in the eight years prior to Robert Myers' death.

(D) Robert Myers was aware of the risk of servicing elevators and working underneath an elevator without first controlling it, since he received extensive training throughout his career, including specific fatality prevention training on 'how to troubleshoot a first-floor door lock', the task he was performing on the date of incident.

(E) Otis did not deliberately conceal or misrepresent the danger involved in servicing elevators so as to prevent Robert Myers from exercising informed judgment.

As Plaintiff has not made an adequate showing to overcome the threshold issue of workers' compensation immunity protections under Section 440.11(1), Fla. Stat. and no genuine issues of material fact exist, OTIS is entitled to Summary Final Judgment on this Count as a matter of law.

II. DUDA AND DEVINCENTIS — CRIMINAL ACTS EXCEPTION

Plaintiff has not proven, by clear and convincing evidence, that the Criminal Acts Exception to Duda's and DeVincentis' workers' compensation immunity applies, and has not established that any genuine issues of material fact exist as to same. *See* Section 440.11(1), Fla. Stat. (The Florida Legislature intended to provide heightened immunity 10 corporate officers, managers,

and supervisors provided their conduct is not outside the scope of their managerial or policy-making duties mid does not equate with criminally negligent and reckless conduct). *See also Feraci v. Grundy Marine Constr. Co.*, 315 F. Supp. 2d 1197, 1208 (N.D. Fla. 2004) ("[W]hen evaluating whether the negligent conduct of [a] managerial (employee) rises to a level sufficient to abrogate their statutory immunity, such negligence must be equivalent to a violation of law constituting a first-degree misdemeanor or higher crime."); *See also Pendergrass v. R.D. Michaels, Inc.*, 936 So. 2d 684, 688-89 (Fla. 4th DCA 2000). More specifically:

(A) Plaintiff did not establish that Duda and/or DeVincentis acted outside the course and scope of their employment and outside Otis' corporate structure, nor that either engaged in culpable/criminal negligence.

(B) Duda and DeVincentis are not corporate officers of Otis and are not involved in creating Otis' Troubleshooting Policies and Procedures. Their respective jobs are to implement Otis' Troubleshooting Policies and Procedures in accordance with Otis policies, which they did.

As Plaintiff has not made an adequate showing to overcome the threshold issue of workers' compensation immunity protections under Section 440.11(1). Fla. Stat. and has not established that any genuine issues of material fact exist as to same, DUDA and DEVINCENTIS are each entitled to Summary Final Judgment on this Count as a matter of law.[15]

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15. The facts of this case are easily distinguishable from *Miller v. Culpepper Construction*, Leon County case# 2015 CA 1816,

III. DUDA AND DEVINCENTIS — FELLOW EMPLOYEE EXCEPTION

Plaintiff has not proven by clear and convincing evidence, that the Fellow Employee Exception to Duda's and DeVincentis' workers' compensation immunity applies, and has not established that any genuine issues of material fact exist as to same. *See* Section 440.11(1), Fla. Stat. (A fellow employee is protected from liability unless he acts with "willful and wanton disregard or. . . with gross negligence" resulting in injury or death or proximately causing such injury or death.). *See also Boston*, 112 So. 3d at 659 (A fellow employee is immune from liability if it is established that the employee was acting in furtherance of the employer's business when the incident occurred and that the employee did not act with gross negligence causing injury or death.). More specifically;

(A) At all times, Duda and DeVincentis acted within the course and scope of their employment by having Otis elevator service mechanics, including Robert Myers, follow company's policies and procedures. Neither Duda nor DeVincentis were present when the Robert Myers incident occurred and neither knew that a grave injury would likely result to Robert Myers if he had followed Otis' Troubleshooting Policies. Instead, their respective jobs are to implement Otis' Troubleshooting Policies and Procedures in accordance with Otis policies, which they did.

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cited fey Plaintiff. In *Miller* there was direct evidence of culpable negligence by the cite supervisor.

As Plaintiff has not made an adequate showing to overcome the threshold issue of workers' compensation immunity protections under Section 440.11(1), Fla. Stat. and that any genuine issues of material fact exist, DUDA and DEVINCENTIS are each entitled to Summary Final Judgment in this Count.

IV. OTIS, DUDA, AND DEVINCENTIS — ALL OTHER CAUSES OF ACTION

Plaintiff's claims against ail Defendants for the intentional tort of conspiracy to commit criminal acts, fraudulent misrepresentation, intentional tort of battery, fraudulent concealment, and misdemeanor manslaughter are similarly barred, as a matter of law, due to the applicability of workers' compensation immunity. As such, OTIS, DUDA and DEVINCENTIS are each entitled to Summary Final Judgment on all remaining Counts.

CONCLUSION

Consistent with the foregoing findings of fact and conclusions of law. Defendants' Motion for Final Summary Judgment is **GRANTED** AS TO ALL COUNTS.

DONE and ORDERED in Tallahassee, Leon County, Florida, on November 8, 2021.

/s/ Angela C. Dempsey
ANGELA C. DEMPSEY
CIRCUIT JUDGE

APPENDIX C — ORDER OF THE SECOND JUDICIAL CIRCUIT COURT FOR LEON COUNTY, STATE OF FLORIDA, FILED JUNE 29, 2020

IN THE SECOND JUDICIAL CIRCUIT COURT
FOR LEON COUNTY, STATE OF FLORIDA

CASE NO.: 2017 CA 2239

CATHERINE CRAIG-MYERS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT MYERS,

Plaintiff,

v.

OTIS ELEVATOR COMPANY, A CONNECTICUT FOR PROFIT CORPORATION; LOUIS CARL DEVINCENTIS, INDIVIDUALLY, AND AS EMPLOYEE OF OTIS ELEVATOR COMPANY; JAMES DUDA, INDIVIDUALLY AND AS EMPLOYEE OF OTIS ELEVATOR COMPANY,

Defendants.

June 29, 2020, Decided
June 29, 2020, Filed

Appendix C

ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE OF COURT TO AMEND SECOND AMENDED COMPLAINT ADDING CLAIM FOR PUNITIVE DAMAGES

THIS CAUSE came to be heard before the Court on May 27, 2020, for a hearing on Plaintiff's Motion for Leave of Court to Amend Second Amended Complaint Adding Claim for Punitive Damages. The Court having carefully reviewed and considered the foregoing Motion, Defendants' Response in Opposition to Plaintiff's Motion, Plaintiff's Reply in Support of her Motion, and alter hearing argument of counsel, and the Court being otherwise advised in the Premises, it is hereupon **ORDERED and ADJUDGED**:

Plaintiff's Motion for Leave of Court to Amend Second Amended Complaint Adding Claim for Punitive Damages is hereby **DENIED** as follows:

1. Plaintiff has not sufficiently pled her punitive damage claim against Defendants. Asserting conclusory allegations against all three Defendants, in one count, does not allow each Defendant to separately evaluate the asserted claim. *See Carroll v. Magnaflux Corp.*, 460 So. 2d 991, 992 (Fla. 4th DCA 1984) (dismissing the punitive damage claim against all defendants since even "the most liberal reading" of the count fails to disclose which allegations were intended to be asserted against each separate defendant); *See also Beverly Enterprises-Florida, Inc. v. Estate of Maggiacomo*, 651 So. 2d 816, 817 (Fla. 2d DCA 1995), *rev'd on other grounds*, 661 So2d 1215 (Fla. 1995) (holding that to amend a complaint to add a claim for punitive damages the plaintiff must

provide evidence of acts which *prima facie* show malicious, wanton, or willful disregard of the rights of others).

2. Additionally, Plaintiff has not made an adequate showing to overcome the threshold issue of workers' compensation immunity protections under Florida law, § 440.11(1), Fla. Stat. *See Coney v. Int'l Minerals & Chem. Corp.*, 425 So. 2d 171, 173 (Fla. 2d DCA 1983) ("[W]e hold that the exclusiveness of remedy doctrine embodied in section 440.11(1) bars recovery against IMC for either compensatory or punitive damages."). *See also Sharpe v. Monfort*, 419 So. 2d 1186 (Fla. 1st DCA 1982) ("Punitive damages are not allowed, as an employer's liability under the Act is in lieu of all other liability.").

3. Although Plaintiff has met the procedural requirements, she failed to make a reasonable evidentiary proffer establishing a basis for her recovery of punitive damages against all Defendants. *See* Fla. Stat. § 768.72. More specifically:

(a) Plaintiff relies heavily on OSHA violations as evidence in support of her claim for punitive damages against all Defendants. The admissibility and relevancy of said violations is questionable. *See Boatwrighi v. Sunlight Foods, Inc.*, 592 So. 2d 261 (Fla. 2d DCA 1992) (holding that OSHA's determination of who employed decedent and evidence of the fine levied by OSHA is irrelevant and inadmissible). Even if admissible, OSHA violations do not equate to an intentional tort/misconduct under well-established Florida case law. *See Folds v. J.A. Jones Constr. Co.*, 875 So. 2d 700, 705 (Fla. 1st DCA 2004) (holding that "failure to provide a safe workplace or to follow OSHA guidelines does not constitute an intentional

tort."). *See also Prenderarass v. R.D. Michaels, Inc.*, 936 So. 2d 684, 693 (Fla. 4th DCA 2006) (affirming summary judgment in favor of employer because OSHA violations are insufficient evidence to overcome Florida's workers' compensation immunity threshold and specifically stating that "a serious [OSHA] violation would not of itself constitute an intentional tort, because it only requires a substantial probability, not certainty, of injury or death;" and that "a willful [OSHA] violation indicates a plain indifference to a regulation, not substantial certainty that such violation will result in injury or death. The citation for willful violation therefore does not raise a material issue of fact as to whether such intentional conduct is substantially certain to result in injury or death."). Thus, the underlying basis for Plaintiff's Motion for Leave to Amend Second Amended Complaint to Assert Punitive Damages - OSHA violations - is insufficient to establish the foundation of a claim for punitive damages.

(b) Plaintiff's remaining factual proffer supporting her claim for punitive damages against all Defendants is either largely insufficient or partially inaccurate based upon filed record evidence.[1] Specifically, Plaintiff attempts

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1. Some examples of factual inaccuracies are Plaintiff's statements that Robert Myers had zero OSHA regulation training, James Duda is an Otis regional manager and that Access Alert has not been installed on the subject elevator or other elevators that were modernized or installed subsequent to this incident - all of which is refuted by actual record evidence. *See* Defendants' Response in Opposition to Plaintiff's Motion for Leave to Amend Second Amended Complaint at Ex. P. *See also*, Deposition Transcript of James Duda, 7/31/18, at 7:19-22; 120:11-14 (Branch/General Manager). *See* Deposition Transcript of Robert Rodriguez, Otis Corporate Representative, 4/2/20, at 124:25-125:1-11 (Access Alert installed).

to proffer that Robert Myers died because he followed Otis' Troubleshooting policy. However, the record evidence Plaintiff submitted in support of her proffer suggests that:

(1) Otis' Troubleshooting policy is not virtually certain to result in injury or death when followed.[2] (*See* Deposition Transcript of Lee Rigby, OSHA Expert Witness, 9/20/18, at 56:12-22: 57:12-58:21. *See also* Deposition Transcript of Robert Rodriguez, Otis Corporate Representative, 4/2/20, at 121:7-122:1).

(2) Robert Myers did not follow Otis' Troubleshooting policy on the date of incident. (*See* Deposition Transcript of Lee Rigby, OSHA Expert Witness, 9/20/18, at 62:25-63:2; 63:21-25; 70:19-71:10. *See also* Deposition Transcript of Robert Rodriguez, Otis Corporate Representative, 4/2/20, at 68:2-17; 94:11-20; 120:22-121:5: Deposition Transcript of Louis DeVincentis, 7/31/18, at 60:20-61:14; and Deposition Transcript of James Duda, 7/31/18, at 35:22-36:2).

(c) The remainder of Plaintiff's proffer does not contain more than mere allegations and therefore does not meet the evidentiary showing required by Fla. Stat. § 768.72. *See Bistline v. Rogers*, 215 So. 3d 607, 610-611 (Fla. 4th DCA 2017). An evaluation of the evidentiary showing

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2. Plaintiff's continued reliance on *McCain v. Florida Power Co.*, 593 So. 2d 500 (Fla. 1992), a non-workers' compensation negligence case (addressing proximate causation in negligence cases) is misplaced and inviting this Court to commit error. There is no conflict in the case law regarding the interpretation of the "virtual certainty" standard under § 440.11(1)(b), Fla. Stat., and the First District Court of Appeal in this very case already cited to and approved the "high standard of virtual certainty". *See LaFreniere v. Craig-Myers*, 264 So. 3d 232, 239-40 (Fla. 1st DCA 2018).

required by Section 768.72 does not contemplate the trial court simply accepting the allegations in a complaint or motion to amend as true, and a trial court must "act as a gatekeeper and preclude a claim for punitive damage where there is no reasonable evidentiary basis for recovery. *Id.* at 611. Merely pleading a facially sufficient claim for an intentional business tort is not sufficient to claim punitive damages. Punitive damages are reserved for particular types of behavior which go beyond mere intentional acts. *Id.*

4. Plaintiff also failed to make a reasonable evidentiary proffer establishing a basis for an independent claim of punitive damages against James Duda and/or Louis DeVincentis. *See* Fla. Stat. § 768.72. More specifically:

(a) Plaintiff's proffer did not include a reasonable evidentiary showing, that James Duda and/or Louis DeVincentis acted outside the course and scope of their employment and outside Otis' corporate stricture. Instead, all record evidence establishes that at all times both James Duda and Louis DeVincentis acted in furtherance of Otis' business, followed Otis' policies, and were not present when the Myers incident occurred. *See* ¶2, *supra.*

(b) Plaintiff's proffer did not establish by a reasonable evidentiary basis that James Duda and/or Louis DeVincentis acted with gross or culpable negligence. Plaintiff's proffer contained conclusory allegations without reference to any record evidence. More is needed under Florida law. *See Carroll*, 460 So. 2d at 992 (holding that only ultimate facts, rather than conclusory terms and opinions, are sufficient to support a claim for punitive damages); *See also Beverly Enterprises-Florida, Inc., supra.*

Appendix C

Consistent with the foregoing, Plaintiffs Motion for Leave of Court to Amend Second Amended Complaint Adding Claim for Punitive Damages is **DENIED**.

DONE and ORDERED in Tallahassee, Leon County, Florida, on June 29, 2020.

/s/ Angela C. Dempsey
ANGELA C. DEMPSEY
CIRCUIT JUDGE

APPENDIX D — DENIAL OF REHEARING OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, DATED AUGUST 14, 2023

DISTRICT COURT OF APPEAL
FIRST DISTRICT
2000 Drayton Drive,
Tallahassee, Florida 32399-0950
Telephone No. (850) 488-6151

Case No. - 1D21-3838

L.T. No.: 2017-CA-002239

CATHERINE CRAIG-MYERS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF ROBERT MYERS, DECEASED,

Appellant(s),

v.

OTIS ELEVATOR COMPANY, A CONNECTICUT FOR PROFIT CORPORATION; LOUIS CARL DEVINCENTIS, INDIVIDUALLY AND AS AN EMPLOYEE OF OTIS ELEVATOR COMPANY; JAMES DUDA, INDIVIDUALLY AND AS AN EMPLOYEE OF OTIS ELEVATOR COMPANY,

Appellee(s).

August 14, 2023

Appendix D

BY ORDER OF THE COURT:

The Court denies the amended motion for rehearing and written opinion docketed July 18, 2023.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

/s/
Kristina Samuels, Clerk
1D2021-3838 August 14, 2023